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No. 10-151

Supreme Court, U.S.
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In The
Supreme Court of the United States

LARRY DEPEE, a California Highway Patrol Officer, and the STATE OF CALIFORNIA,

Petitioners,

v

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of John Joseph Wayne Watkins,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

This Court's seminal decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), guides the federal courts in the exercise of their discretion whether to award attorney fees under 42 U.S.C. § 1988 when a civil rights plaintiff obtains only a nominal judgment on a § 1983 cause of action. Despite a plaintiff's prevailing party status, this Court held that for such a plaintiff "the only reasonable fee is usually no fee at all." *Id.* at 114. The Court ruled that "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Id.*, quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Thus, the Court held that when the plaintiff's objective in a lawsuit is restricted to recovery of damages for herself, her "extent of success" is defined by what damages she recovers. And the Court stated: "Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Id.*, quoting *City of Riverside v. Rivera*, 477 U.S. 561, 585 (1986) (Powell, J., concurring in judgment).

Despite this precise legal prescription, respondent maintains that the *Farrar v. Hobby* presumption of *zero* attorney fees should not apply in her "unusual" case for three reasons. Brief in Opp. 1. First, she argues that the Ninth Circuit properly ignored the discrepancy between the amount of damages sought and the amount of damages awarded because she never "specified" the dollar amount of compensatory

damages sought for her Fourth Amendment § 1983 claim. *Id.* 1, 3, 12, 13. Second, she maintains that the Ninth Circuit properly concluded that the trial judge's ruling denying pain-and-suffering damages for her § 1983 claim justified an award of fees because the jury returned the maximum verdict (one dollar) to which she was entitled. *Id.* 1, 4, 13. Third and lastly, she maintains that, despite *Farrar's* holding that primary consideration be given to the amount of damages awarded as compared to the amount sought, there is ample justification for the Ninth Circuit's conclusion that fees are justified because her claim of excessive force resulted in a significant injury, a death. *Id.* 1, 14.

As set forth more fully below, respondent's contention that she is entitled to fees under *Farrar* because she did not specify the amount of compensatory damages sought for her Fourth Amendment § 1983 claim is undermined, not only by her complaint and closing argument to the jury which sought $10 million, but by an extensive record of efforts on her part seeking significant compensatory damages on behalf of the decedent. Her contention that, because the trial judge ruled that she was not entitled to general damages on the § 1983 claim, she received the maximum verdict to which she was entitled (one dollar) cannot absolve her from *Farrar's* requirement that she show some success in order to justify an award of fees. And finally, her contention that she is entitled to fees under *Farrar* because the excessive force claim resulted in a death is a prescription for fees that is

not authorized by *Farrar* and that is not measurable by any standard. All of these excuses, including the assertion that the constitutional violation resulted in a grave injury, could apply to any number of civil rights actions, and they therefore cannot rebut the presumption of *Farrar* that, where a plaintiff is awarded a nominal judgment only, "the only reasonable fee is usually no fee at all." *Id.* at 114.[1]

ARGUMENT

I. The Ninth Circuit Did Not Correctly Apply The *Farrar* Standard

A. The Court Rejected The Majority Holding In *Farrar* That, In Fixing Fees, Primary Consideration Be Given To The Discrepancy Between The Amount Of Damages Sought And The Damages Awarded

As stated in the petition, the Ninth Circuit ignored the entire operative complaint, expressly

[1] Respondent's recitation of the decision of the court below includes a lengthy quotation citing a forensic pathologist's declaration opposing summary judgment, which the Ninth Circuit itself cited as part of the record. Brief In Opp 2 But this case went up on appeal from a jury verdict, not summary judgment, and the pathologist did not testify at trial. The Ninth Circuit's statement that "[t]he evidence at trial was largely consistent with this narrative" is both inexplicable and inaccurate because the evidence does not appear in the trial record.

incorporating by reference an attached government claim, that specified respondent was seeking $10 million for the death of the decedent, and indeed, respondent argued to the jury for compensatory damages of $10 million.[2] Petition 7; *see* Petitioners' Appendix D, *infra*, 37, 49-53; Brief In Opp., Appendix A, 5a.[3] These are inarguably the two most important points in any litigation, and at these two points, respondent was very clear that she sought significant compensatory damages for the death of her decedent.

In closing argument specifically, respondent's counsel asked the jury to award her client compensatory damages in excess of $10 million, plus an unspecified amount of punitive damages on her Fourth Amendment § 1983 cause of action. Respondent's plea for $10 million in general damages explicitly referred to Claim 1 on the verdict form, which was the Fourth Amendment § 1983 cause of action, rather than Claim 3, which was respondent's separate wrongful

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[2] Respondent admits that she expressly incorporated her $10 million government claim into her complaint, but suggests now that the claim specified damages for loss of companionship and future income for her, and did not specify damages of the decedent for her Fourth Amendment claim. Brief In Opp. 3, fn 2. The suggestion is based on a tortured and unjustified reading of the claim. Appendix D 49-53. The claim does not distinguish between respondent's claims and her claims on behalf of the decedent. Nor does the claim limit the damages sought to only those damages to which respondent is entitled on her claims. *Id.*

[3] Petitioners' Appendix to the Reply Brief consists of excerpts of the record provided to the Ninth Circuit.

death cause of action under state law. Brief In Opp., Appendix A, 5a; Appendix E, *infra*, 55-57. Respondent now insists that she asked the jury for a $10 million verdict only on her state wrongful-death cause of action, and for nothing more than nominal damages on her Fourth Amendment § 1983 claim (*see* Brief In Opp. 4-5, fn 4), but the record speaks for itself.

Moreover, as will be shown presently, between the filing of the complaint seeking $10 million and respondent's plea to the jury for $10 million on her Fourth Amendment § 1983 claim, an extensive record also overlooked by the Ninth Circuit shows that respondent fought hard for significant compensatory damages on her Fourth Amendment § 1983 claim, refuting any contention that the extent of her success should not be measured under *Farrar* because she failed to seek a specific amount of damages against which her nominal damage verdict can be compared.

To begin with, respondent's First Amended Complaint for Damages sets forth respondent's Fourth Amendment § 1983 cause of action, and it expressly pleads and prays for compensatory damages on behalf of the decedent's estate. Appendix D, *infra*, 35, 38-47. Paragraph 76 in that cause of action alleges that respondent and her decedent "suffered great mental and physical pain, suffering and anguish" and "the loss of love, comfort, society, solace and support, all to their damage in a sum to be determined at trial." *Id.* at 47. These are typical categories of general and special damages, for which respondent specifically

asked in the prayer of the complaint. *Id.* at 47-48. And, as set forth above, attached to the complaint was respondent's government claim seeking $10 million in damages for the death of the decedent, which was expressly incorporated by reference as part of the Fourth Amendment § 1983 cause of action on behalf of the decedent. Appendix D, *infra*, 49-53.

In the parties' Joint Pretrial Conference Statement, respondent outlined the damages she was seeking and the evidence she planned to introduce to prove those damages. Appendix F, *infra*, 66-72. She described three categories of "relief prayed", and she specifically distinguished between her own damages for wrongful death under California law and the decedent's (as well as her own) § 1983 civil rights damages. *Id.* at 67-68. Those compensatory damages under § 1983 included special damages for medical expenses and lost income, as well as general damages (pain and suffering). With regard to the decedent's § 1983 damages, which would have been relevant only to the Fourth Amendment § 1983 cause of action, respondent said she planned to introduce the expert testimony of a doctor, who would "testify as to the pain and suffering experienced by Decedent during the time that he was shot and the time that he died." *Id.* at 68.[4] Respondent also included a legal

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[4] Respondent ultimately elected not to present this evidence, so the record contains no evidence at all to prove that the decedent experienced any pain and suffering prior to his death.

argument that she was entitled to seek damages for pain and suffering, as well as punitive damages, on behalf of the decedent under § 1983. *Id.* at 69-70.

Before trial respondent submitted proposed jury instructions in which she again requested compensatory damages for her Fourth Amendment § 1983 cause of action. Respondent requested an instruction on the "Measure of Types of Damages," and specifically listed a claim for compensatory damages for the "mental, physical, emotional pain and suffering experienced by John Watkins prior to his death." Appendix F, *infra*, 73-75.

Respondent continued her campaign for compensatory damages on the Fourth Amendment § 1983 claim even after the verdict of one dollar. She filed a motion for new trial as to damages only. Appendix F, *infra*, 92-95. In that motion she reargued the legal question whether a § 1983 plaintiff may recover pain and suffering damages, despite California's survival statute, stating: "Clearly, the plaintiff was entitled to an instruction of compensatory damages for her son's Section 1983 wrongful death claim." *Id.* at 94. The trial court reaffirmed its earlier decision on this question and denied the respondent's motion for a partial new trial. Appendix E, *infra*, 58-64.

By focusing exclusively on the complaint's failure to specify the amount of damages claimed and failing to consider the entire record, the Ninth Circuit and the respondent make a mockery of the *Farrar*

reasoning requiring that, in fixing fees, the primary consideration be given to the amount of damages awarded as compared to the amount sought. *Farrar*, 506 U.S. at 114. In actuality, the entire record shows that respondent specified the amount of compensatory damages she sought for the death of her son in her government claim incorporated into the complaint and her closing argument to the jury, and she fought hard for significant compensatory damages for more than two years, never once intimating that she would have been perfectly satisfied with only nominal damages to vindicate the claim of civil rights violation. The lower court's analysis guts *Farrar* of any substance and invites counsel simply to refrain from specifying any particular sum for damages as insurance towards an award of fees.

B. The Court Gutted The Majority Holding In *Farrar* By Approving A Fee Award Based On The Trial Judge's Ruling That Respondent Was Not Entitled To Compensatory Damages

The Ninth Circuit's conclusion, echoed by respondent, that the trial judge's ruling denying pain-and-suffering damages weighs in *favor* of a fee award because the jury returned a verdict of one dollar (the maximum respondent was entitled to under law), defies logic and turns on its head *Farrar's* mandate that respondent show some "degree of success" in order to overcome the usual presumption of zero attorney fees in a nominal verdict case. *Farrar*, 506 U.S. at 114.

The record shows that respondent tried hard to persuade the trial judge that pain and suffering damages were available on her § 1983 claim but ultimately failed in that attempt, and she was unable to prove any other compensatory damages as the decedent died before he could receive medical treatment (*see* Brief In Opp. 4, fn 3).

The issue whether respondent could recover compensatory damages for her decedent's pain and suffering under § 1983 was hotly contested and briefed by both sides before trial. Petitioners filed a motion in limine to exclude evidence of decedent's alleged pain and suffering before death. Petitioners argued that California's survival statute did not allow for a survivor (here, respondent herself) to recover for the decedent's pain and suffering damages (*see* Cal. Code Civ. Proc. § 377.34) and that this state law limitation applied to respondent's claim for the decedent's compensatory damages on her Fourth Amendment § 1983 cause of action. Appendix F, *infra*, 76-79. Respondent argued in opposition that California's survival statute is inconsistent with the remedial purpose of § 1983 and, therefore, the decedent's "pain and suffering [should be] recoverable under his Section 1983 claim." *Id.* at 79. Respondent continued to press her argument all the way through trial.[5]

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[5] On the very last day of the trial, with the trial judge still undecided on this question, the parties argued the issue out of the jury's presence about the proposed jury instructions. Appendix F, *infra*, 80-91. Respondent's counsel insisted the relevant

(Continued on following page)

Ultimately, however, the trial court agreed with petitioners' view of the law and relying on the California statute and citing *Venerable v. City of Sacramento*, 185 F. Supp.2d 1128 (E.D. Cal. 2002), the court elected to give a jury instruction that did not include such damages. Appendix G, *infra*, 97-98.

Civil rights cases are difficult cases to prove, and many plaintiffs fail to win compensatory damages either because of the law or a failure of proof. If winning a nominal verdict after trying *and failing* to win compensatory damages can justify an award of substantial fees, private counsel will have every incentive to bring non-meritorious civil rights actions in federal court because a substantial attorney fee award awaits them in the end.

C. The Court's Authorization Of Fees Based On The Gravity Of Decedent's Injury Is Not A Standard Authorized By The Majority Holding In *Farrar*

Respondent reiterates the Ninth Circuit's reasoning that significant attorney fees are authorized

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case law supported her position that respondent was entitled to recover, not just nominal damages, but compensatory damages for the decedent's pain and suffering. *Id.* at 86-87. When the court tentatively agreed with respondent on this point during oral argument, counsel stated. "I obviously agree with the Court, in that the [respondent] is entitled to – as a successor in interest, to get those compensatory damages for Mr. Watkins himself . . . " *Id.* at 91.

because "a police officer's excessive force *results in death.*" Brief In Opp. 14. The majority holding of *Farrar* did not adopt either of Justice O'Conner's two alternative justifications for fixing fees in a § 1983 case – the "significance of the legal issue" and "public purpose" justifications. *See* Petition 9. But even if it had, the Ninth Circuit's announcement of a standard based on the gravity of the injury effectively makes fees the rule rather than the exception – even when only nominal damages are recovered. Unconstitutional force causing death is certainly important, but it is no more or less important than unconstitutional force causing, e.g., permanent brain injury, loss of limbs, long-term psychiatric trauma, or merely cuts and bruises, and it is no more or less important than any other civil right violation causing injury. *See Milton v. Des Moines*, 47 F.3d 944 (8th Cir. 1995), *cert. denied*, 516 U.S. 824 (1995) (plaintiff suffered blows to the head when police beat him with their flashlights, but the circuit court denied attorney fees).

And therein lies the problem with Justice O'Conner's two alternative justifications for fixing an award of fees – they are so vague and imprecise that they create no standard to guide the exercise of judicial discretion. They permit courts to award fees in any civil rights case despite a plaintiff's failure to receive anything more than nominal damages, on the grounds that violations of civil rights are important, or injuries are important, or nominal verdicts serve some public purpose. That these alternative justifications fail to provide meaningful guidance to the lower

courts was recently demonstrated once again by the Ninth Circuit in *Guy v. City of San Diego*, 608 F.3d 582 (9th Cir. 2010), where the court reversed a district court's denial of attorney fees in a nominal-verdict excessive force case. In *Guy*, the plaintiff was sprayed with pepper spray and received only cuts and bruises; the Ninth Circuit justified a fee award on the rationale that the fee award (not the nominal verdict itself) would serve the public purpose of encouraging cities to train police officers to avoid excessive force. Petitioners submit that the inconsistent results in the lower courts occur because the "significance of the legal issue" and "public purpose" justifications are empty standards that invite the federal courts to routinely award significant attorney fees in nominal verdict cases, trumping the majority holding of *Farrar* that "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Farrar*, 506 U.S. at 114.

CONCLUSION

For these reasons and the reasons stated in the petition for certiorari, the petition for certiorari should be granted.

Dated: November 30, 2010

Respectfully submitted,

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APPENDIX D

08-15694

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff-Appellee,

v.

LARRY DEPEE, a California Highway Patrol Officer,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 3:05-cv-01143-SI
The Honorable Susan Illiston, Judge

EXCERPTS OF RECORD

VOLUME II

* * *

[1] IN AND [sic] THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff,

Vs.

LARRY DEPEE, STATE OF CALIFORNIA, and DOES 1 through 100, Inclusive,

Defendants.

CASE NO: C-05-1143-SI

FIRST AMENDED COMPLAINT FOR DAMAGES:

1. **Wrongful Death Based on:**
   a. **Assault and Battery;**
   b. **Negligence;**
   c. **Negligent Hiring, Training and Retention;**
2. **Assault and Battery (Survival Action);**
3. **Negligence (Survival Action);**
4. **Negligent Hiring, Training and Retention;**
5. **Intentional Infliction of Emotional Distress;**
6. **Violations of Civil Rights (42 U.S.C. § 1983);**
7. **Violations of Civil Rights (42 U.S.C. § 1985(3) and 1986, action for neglect to prevent civil rights violation.**

DEMAND FOR JURY

(Filed May 6, 2005)

* * *

[3] 6. In addition to the facts alleged in the following subparagraphs, the following defendants are all sued in their individual and official capacities and all acted within the scope of their employment and under color of state law, to wit, under color of the statutes, ordinances, regulations, policies, customs and usages of the State of California:

(a) Defendant LARRY DEPEE, was at all times a California Highway Patrol Officer;

7. Plaintiff is unaware of the true names and capacities of those Defendants sued herein as DOE Defendants. Plaintiff will amend this complaint to allege said Defendants' true names and capacities when that information becomes known to them. Plaintiff is informed and believes and thereon allege that these DOE Defendants are legally responsible and liable for the incident, injuries and damages hereinafter set forth, and that each of said Defendants proximately caused the injuries and damages by reason of negligent, careless, deliberately indifferent, intentional, willful or wanton misconduct in creating and otherwise causing the incidents, conditions and circumstances hereinafter set forth, or by reason of direct or imputed negligence or vicarious fault or breach of duty arising out of the matters herein alleged. Plaintiff will seek leave to amend this complaint to set forth said true names and identities of the unknown named DOE Defendants when they are ascertained.

8. Plaintiff is informed and believes and thereon allege [sic] that, at all times herein mentioned, each of the Defendants was the agent and/or employee and/or co-conspirator of each of the remaining Defendants, and in doing the things hereinafter alleged, was acting within the scope of such agency, employment and/or conspiracy and with the permission and consent of the other co-defendants.

9. Defendant STATE OF CALIFORNIA is liable pursuant to Government Code § 815.2.

10. On May 19, 2004, Plaintiff presented to Defendant STATE OF CALIFORNIA, pursuant to California Government Code Section 910, a timely written claim for the injuries and damages sustained by Plaintiff as a result of the incident described in this complaint. A copy of those claims are attached hereto as **Exhibit "B"** and incorporated herein by this reference.

* * *

[14] 62. As a result of the above-mentioned conduct of Defendants and each of them, DECEDENT suffered extreme pain and severe mental anguish, as well as mental and physical damage and injury to his mind and body.

FOR THE SIXTH CAUSE OF ACTION

(By Plaintiff SYLVIA MAHACH-WATKINS individually and as Successor in Interest to JOHN JOSEPH WAYNE WATKINS against Defendant DEPEE and DOES 1 through 100 For Violations of Civil Rights [42 U.S.C. Section 1983])

COUNT 1 OF THE SIXTH CAUSE OF ACTION BASED ON VIOLATION OF PLAINTIFF'S AND DECEDENT'S CONSTITUTIONAL RIGHTS AS A RESULT OF THE DEATH OF JOHN JOSEPH WAYNE WATKINS

63. Plaintiff restates and reiterates the foregoing Paragraphs of this complaint as if set forth n [sic] full at this point.

64. This cause of action is to redress the deprivation, under color of statute, ordinance, regulation, policy, custom, practice or usage of a right, privilege and immunity secured to SYLVIA MAHACH-WATKINS and to DECEDENT by the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and the Constitution and laws of the State of California.

65. Plaintiff, SYLVIA MAHACH-WATKINS, is the successor in interest to the Estate of DECEDENT and brings this cause of action in that capacity and in place of DECEDENT who, but for his death, would bring this cause of action. Additionally, Plaintiff, SYLVIA MAHACH-WATKINS brings this cause of

action to redress the deprivation, under color of statute, ordinance, regulation, policy, custom, practice or usage of rights, privileges, and immunities secured to SYLVIA MAHACH-WATKINS by the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and the Constitution and laws of the State of California.

[15] 66. At all times herein mentioned, the defendant, STATE OF CALIFORNIA employed the individual Defendants herein and in particular, Defendant DEPEE. Said Defendant provided its individual Defendant DEPEE, employees and agents with official badges and identification cards that designated and described the bearers as employees of the STATE OF CALIFORNIA.

67. During all times herein mentioned, the Defendants, and each of them, separately and in concert, acted under color and pretense of law, under color of the statutes, ordinances, regulations, policies, practices, customs and usages of the State of California. Each of the Defendants herein, separately and in concert deprived SYLVIA MAHACH-WATKINS, and DECEDENT of the rights, privileges and immunities secured to them by the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and the laws of the United States and the Constitution and laws of the State of California.

68. Plaintiff is informed and believes, and thereon alleges that on or about December 9, 2003,

Defendants fatally assaulted, battered, shot and killed DECEDENT as previously described, all of which constituted deadly, excessive, unjustifiable, and unreasonable force in violation of his constitutional right to be free from unreasonable force in violation of his constitutional right to be free from unreasonable searches and seizures, and his due process rights to be free from arbitrary-deprivations of life, liberty, property or the pursuit of happiness. By causing the death of DECEDENT these actions additionally violated SYLVIA MAHACH-WATKINS' right to substantive due process, their rights to privacy, to associate with their son/brother, to cohabitate with their son/brother, to enjoy the care, companionship of her son and to be free from arbitrary and unreasonable government intrusions into the family unit. The above-alleged conduct was done with deliberate indifference and/or intentionally by the shooting officer, Defendant DEPEE.

69. Plaintiff is informed and believes and thereon alleges that Defendants, and each of them, thereafter willfully and intentionally undertook to protect their fellow officer involved in the shooting from civil and criminal liability by falsifying, distorting and covering up the true facts of the death of DECEDENT in violation of Plaintiff's constitutional rights. These facts include but are not limited to:

(a) Halting and interfering with the Del Norte County's investigation into the matter;

[16] (b) Removing the Del Norte County Coroner from the scene of the investigation;

(c) The altering of evidence at the scene of the shooting of DECEDENT;

(d) Giving false statements regarding the circumstances of the shooting and intentionally and willfully refraining from collecting and recording other evidence at or near the scene of the shooting; and refusing to reveal and turn over evidence which would show that DECEDENT had not committed any wrong justifying the actions of the above-mentioned defendants causing his death;

(e) Failing to promptly obtain, preserve and test urine samples from the officer involved in the shooting;

(f) Moving and removing, and failing to collect physical evidence at the scene;

(g) Intimidating and misleading civilian and police witnesses;

(h) Permitting and encouraging officers involved in misconduct to conspire together before giving official statements regarding the circumstances of their conduct;

By so doing, Defendants have intentionally interfered with Plaintiff'ss [sic] right of meaningful access to courts, protected by the United States Constitution.

70. The facts alleged above are part of the customs, practices, policies and decisions of Defendant STATE OF CALIFORNIA, which include, but are not limited to the following:

(a) Using grossly excessive force on citizens;

(b) Falsifying, distorting, and/or covering up the criminal and/or wrongful activities of fellow law enforcement officers by false reporting, false investigating, perjury and dishonesty, in violation of the rights and privileges of Plaintiff and other civilian citizens;

(c) Inadequately and/or fraudulently investigating allegations of misconduct by fellow law enforcement officers, including the use of excessive force in order to cover up and protect fellow officers from disciplinary, criminal and civil actions in violation of Plaintiff and other citizens' right and privileges to meaningful access to the courts as provided by the United States Constitution.

[17] (d) Refusing to supervise, reprimand, and/or discipline law enforcement officers who engage in misconduct contrary to the laws, rules and regulations, thus condoning the use of excessive force and the conducting of unlawful searches and seizures by officers, deputies and agents;

(e) Intimidating, ostracizing and threatening citizens and other law enforcement

officers who report acts of police misconduct;

(f) Refusing to undertake discovery of fellow law enforcement officers' misconduct or inadequately and impartially investigating the same;

(g) Failing to enforce the laws, rules, regulations and procedures when an investigation is conducted of a fellow law enforcement officer, and thereby denying Plaintiff and similarly situated citizens equal protection of the laws and meaningful access to the courts as provided by the United States Constitution;

(h) Inadequately training and supervising employees of the governmental entity, Defendants herein, with respect to the apprehension of suspects, the existence of probable cause, the proper use of force, and the investigation of police misconduct;

(i) Choosing a policy which fails to implement procedures and policies to ensure that law enforcement officers impartially investigate police misconduct, including criminal misconduct, on the part of its officers, deputies and agents;

(j) Tacitly approving of law enforcement officers using the power and position to interfere with civilian citizens' rights, including the right to be free from unreasonable searches and seizures, the

right to be free from arbitrary governmental intrusions into their family unit, their right to enjoy security in the persons, houses, papers and effects against unreasonable searches and seizures, and not to be arrested and/or subject to deadly force without reasonable justification and probable cause.

(k) Condoning racist attitudes and conduct motivated by racial animus within the California Highway Patrol Department against American Indians with respect to the use of policy authority, and in particular, the use of force and deadly force resulting in [18] more force being used against American Indians than other similarly situated citizens and resulting in the violation of their Constitutional rights.

71. The above acts or omissions of the Defendants were undertaken while under color of State law and resulted in the violation of SYLVIA MAHACH-WATKINS and DECEDENT's constitutional rights, as stated herein. Likewise, the customs, practices, policies, and decisions of the STATE OF CALIFORNIA alleged herein and as applied to SYLVIA MAHACH-WATKINS and DECEDENT, resulted in violation of SYLVIA MAHACH-WATKINS and DECEDENT's constitutional rights.

72. The above acts, omissions, customs, practices and/or decisions of the STATE OF CALIFORNIA, while carried out under color of law, have

no justification or excuse in law, and instead constitute a gross abuse of governmental authority and power, shock the conscious, are fundamentally unfair, arbitrary, and oppressive and unrelated to any activity in which governmental officers may appropriately and legally undertake in the course of protecting persons or property, or ensuring civil order. The above acts, omissions, decisions, customs, practices or policies were consciously chosen from among various alternatives.

73. Despite the fact that the STATE OF CALIFORNIA knew or should have known these omissions, decisions, practices, customs and policies, both formal and informal, were being carried out by its agents and employees, the STATE OF CALIFORNIA has taken no steps or efforts to order a halt to this course of conduct, to make redress to these [sic] Plaintiff or other civilian citizens injured thereby, and has failed to take any disciplinary action whatsoever against any of its employees or agents. As such, the STATE OF CALIFORNIA has ratified the wrongful conduct and custom resulting in violations of Plaintiff [sic] civil rights.

74. Plaintiff has a substantive right to access to courts as protected by the First Amendment right to petition. Plaintiff has a right to present to the judiciary allegations concerning violations of fundamental constitutional rights as protected by the Due Process Clause of the Fifth and Fourteenth Amendment without interference from governmental authorities. Plaintiff has a constitutionally-protected

right to institute a wrongful death suit in courts for the death of their loved one, without interference from governmental authorities. Plaintiff has a liberty interest in [19] being free from abusive governmental action and in being accorded procedural and substantive due process of law. Plaintiff has a property interest in recovering for the wrongful death of their loved one and the violation of their constitutional rights. Plaintiff also has a liberty interest in maintaining their personal integrity, dignity, reputation and honor as family members and citizens and not be deprived of her right of association with the DECEDENT. Plaintiff's DECEDENT had a liberty interest to life and the right no [sic] to be deprived of liberty or property without due process of law. Plaintiff's DECEDENT had the right to be free from unreasonable searches and seizures, the right to be free from punishment absent criminal conviction, and the right to be free from the use of unreasonable and excessive force. All of these rights and privileges are secured to Plaintiff and her DECEDENT by the provisions of the First Amendment, Fourth Amendment and the Due Process Clause of the Fifth and Fourteenth

75. Defendants, and each of them, acted in concert and without authorization of law and each of the individual Defendants, separately and in concert, acted willfully, knowingly, with reckless disregard and callous indifference, and purposefully with the intent to deprive Plaintiff and her DECEDENT of their rights and privileges, and did in fact violate the

aforementioned rights and privileges in an amount to be proven at time of trial of this matter.

76. As a direct and proximate result of the aforesaid acts, omissions, customs, practices, policies and decisions of the defendants, and each of them, Plaintiff and her DECEDENT have suffered great mental and physical pain, suffering and anguish, fright, nervousness, anxiety, grief, shock, humiliation, indignity, embarrassment, apprehension, the loss of love, comfort, society, solace and support, all to their damage in a sum to be determined at trial. Plaintiff and her DECEDENT have been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the Defendants. Additionally, Plaintiff has been forced to incur substantial amounts of attorneys' fees, investigation expenses and other expenses in the vindication of their constitutional rights.

77. Plaintiff is entitled to and hereby demand costs, attorneys fees and expenses pursuant to 42 U.S.C. Section 1988.

* * *

[21] **WHEREFORE** Plaintiff pray [sic] for judgment against Defendants as follows:

1. For burial and funeral related expenses according to proof at trial;

[22] 2. For general damages in an amount to be determined according to proof at trial;

3. For medical and related expenses according to proof at trial;

4. For costs of suit incurred herein;

5. For punitive damages against the individual defendants in an amount to be determined according to proof at trial;

6. For attorneys' fees, investigation fees, and expert witness fees incurred herein; and

7. For such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

DATED: May 1, 2005

LAW OFFICES OF
TORY M. PANKOPF
LAW OFFICES OF
MARY H. BEATIFICATO

BY: /S/ TORY M. PANKOPF
TORY M. PANKOPF
MARY H. BEATIFICATO
Attorneys for Plaintiff

State of California
Board of Control
GOVERNMENT CLAIM
SBOC-GC-0002 (Rev. 6/00)

Please read "Instructions for Filing a Claim"

If you are filing this claim beyond six months from the incident date, please see instructions for filing a late claim application on the opposite page.

G

Section 1: Claimant Information

Name of Claimant	Telephone Number (include area code)
Patricia Ann Watkins (Sister of decedent John Watkins)	(707) 464-7734
Sylvia Mahach-Watkins (Mother of decedent John Watkins)	

Mailing Address	City	State	Zip Code
P.O. Box 2132	Crescent City	CA	95531

Section 2: Claim Information

Is the claim filed on behalf of a minor? ☐ Yes ☒ No
If yes, please indicate: Relationship to the minor _____
Date of birth of the minor _____

Name of State Agency against which this claim is filed	Incident Date	Dollar Amount of Claim
California Highway Patrol	Month 12 Day 10 Yr. 2003	$10,000,000.00

If the amount exceeds $10,000, indicate type of civil case: ☐ Limited Civil Case ☒ Non-Limited Civil Case	Explain how the dollar amount claimed was computed (Attach three copies of the supporting documentation for the amount claimed with this firm.) Wrongful Death: loss of benefits and funeral expenses; present value of future contributions; loss of society and companionship; Int. and Neg. of Emotional Distress . . .
Describe the specific damage or injury incurred as a result of the incident Shot and killed while unarmed.	
	Location of the incident (if applicable, include street address, city or county, highway number, postmile number and direction of travel) Crescent City, California; S. Hwy 101
	Preferred Hearing Location (if an appearance is necessary) ☒ Sacramento ☐ Los Angeles ☐ Oakland ☐ San Diego

Explain the circumstances that led to the alleged damage or injury. State all facts that support your claim against the State of California, and why you believe the State is responsible for the alleged damage, or injury. If known, provide the name(s) of the State employee(s) who allegedly caused the injury,

damage or loss. (If more space is needed, please attach additional sheets.)

Decedent was riding his bicycle home. Decedent was pulled over by the CHP. Decedent was unarmed. He did not carry a knife or a gun when he was stopped. He was not carrying contraband. For reasons unknown to the claimant at this time, the lone CHP officer responsible for shooting and killing decedent alleges through representatives of the CHP to the local newspaper that the decedent threw his bicycle at the patrol car and fled on foot. The officer pursued, overtook and tackled the decedent to the ground. A struggle insued [sic]. It is alleged that the decedent came to have the officer's flashlight and threatened the officer with it. At such time, the officer decided it was necessary to use deadly force and withdrew his firearm from his holster and discharged his weapon with the intent to kill the decedent. After being shot, the decedent ran a little further into the woods, collapsed, and died by suffocating on his own blood. Because the decedent was unarmed, the officer's decision to use deadly force was unjustified and not within the department's policy and procedure.

State of California
Board of Control
GOVERNMENT CLAIM
SBOC-GC-0002 (Rev. 6/00)
Reverse

Submit completed claim form and three copies to:
STATE BOARD OF CONTROL
GOVERNMENT CLAIMS BRANCH
P.O. Box 3035
Sacramento, CA 95812-3035

Section 3: Insurance Information			
Has the claim for the alleged damage/injury been filed or will it be filed with your insurance carrier? ☐ Yes ☐ No	Policy Number	Telephone number (include area code) ( )	
Mailing Address	City	State	Zip Code
Name of Insurance carrier	Amount of Deductible $		
Are you the registered owner? ☐ Yes ☐ No Make: ____ Model: ____ Year: ____			
Section 4: FOR STATE AGENCY USE ONLY (must be completed by a State agency representative)			
Name of State agency	Badge Act Appropriation or Item Number and the appropriate Schedule if applicable		
	Name of fund or account		
Name of agency budget office representative	Title	CALNET Number	

Signature of agency budget representative	Date

Section 5: Representative Information
(must be completed if claim is being filed by an attorney or authorized representative)

Name of Attorney/ Representative	Telephone Number (include area code)		
Tory M. Pankopf, C.S.B. #202581	(775) 831-0326		
Mailing Address	**City**	**State**	**Zip**
341 Ski Way, #103	Incline Village	NV	89451

Section 6: Notice and Signature

Section 72 of the Penal Code provides that "every person who, with intent to defraud, presents for allowance or for payment to any State Board or Office, or to any county, town, city, district, ward, or village, board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or written, is guilty of a felony."

Signature of Claimant	Date
	May 14, 2003
Signature of Attorney/Representative	Date
Tory M. Pankopf	

APPENDIX E

08-15694

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff-Appellee,

v.

LARRY DEPEE, a California Highway Patrol Officer,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 3:05-cv-01143-SI
The Honorable Susan Illston, Judge

EXCERPTS OF RECORD

VOLUME III

* * *

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS, Plaintiff, v. **LARRY DEPEE, STATE OF CALIFORNIA,** Defendants.	CASE NO. C-05-1143-SI **VERDICT FORM – DAMAGES** (Filed Aug. 9, 2007)

We, the jury in the above-entitled action, unanimously find the following special verdict on the questions submitted to us:

CLAIM I

As to plaintiff Sylvia Mahach-Watkins's first claim for violation of the Fourth Amendment rights of her son John Watkins, what do you find to be the total amount of the compensatory damages, if any, caused by defendant Larry Depee?

No Damages _____ [mark an X]

Nominal Damages __1__ [enter an amount not to exceed one dollar]

[2] As to plaintiff Sylvia Mahach-Watkins's first claim for violation of the Fourth Amendment rights of

her son John Watkins, do you find that defendant Larry Depee's conduct was malicious, oppressive, or in reckless disregard of John Watkins's rights justifying an award of punitive damages?

Yes _____

No ___X___

CLAIM 3

As to plaintiff Sylvia Mahach-Watkins's wrongful death claim against defendant Larry Depee for committing a battery causing the death of John Watkins, what do you find to be the total amount of her compensatory damages, if any, caused by defendant Larry Depee?

No Damages _____ [mark an X]

Nominal Damages ___1___ [enter an amount not to exceed one dollar]

Damages _____ [enter a dollar amount]

As to plaintiff Sylvia Mahach-Watkins's wrongful death claim against defendant Larry Depee for commission of a battery causing the death of John Watkins, do you find that defendant Larry Depee's conduct was malicious, oppressive, or in reckless disregard of John Watkins's rights justifying an award of punitive damages?

Yes _____

No ___X___

If you find that defendant Larry Depee's conduct was malicious, oppressive, or in reckless disregard of

John Watkins's rights as to either Claim One or Claim Three (you answered "Yes" above as to either claim), what do you find to be the amount of the punitive damages you award?

___0___ [enter a dollar amount]

[3] Please have the presiding juror sign and date this form.

DATE: August _8_, 2007

/s/ [signed by]
PRESIDING JUROR

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff,

v.

LARRY DEPEE, et al.,

Defendants.
/

No. C 05-1143 SI

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL NEW TRIAL ON DAMAGES

(Filed Oct. 31, 2007)

Plaintiff's motion for a partial new trial on damages is scheduled for a hearing on November 2, 2007. Pursuant to Civil Local Rule 7-1(b), the Court determines that the matter is appropriate for resolution without oral argument, and VACATES the hearing. For the reasons set forth below, the Court DENIES plaintiff's motion.

LEGAL STANDARD

Rule 59(a) states, "A new trial may be granted . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a)(1). The Ninth Circuit has noted, "Rule 59 does not specify the grounds on which a motion for a new trial may be granted." *Lang v. Am. Gem Seafoods,* Inc., 339 F.3d

1020, 1035 (9th Cir. 2003). Rather, courts are "bound by those grounds that have been historically recognized." *Id.* The Ninth Circuit has held that "[t]he trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 510 n. 15 (9th Cir. 2000). The authority to grant a new trial under Rule 59 "is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chem. Corp. v. Daiflon*, 449 U.S. 33, 36 (1980) (per curiam); *see Vickery v. Fisher Governor Co.*, 417 F.2d 466, 470 (9th Cir. 1969) (trial court has "wide judicial discretion" in considering new trial motion).

DISCUSSION

Plaintiff sued defendants after California Highway Patrol Officer Larry Depee shot and killed her son John Watkins in the course of a late-night encounter in Crescent City, California. The three week jury trial was bifurcated. On liability, the jury returned a mixed verdict: the jury found that defendant Depee violated John's Fourth Amendment rights (42 U.S.C. § 1983) and caused a battery to John (state law wrongful death claim), but found against plaintiff on her own Fourteenth Amendment claim. In the damages phase, the jury awarded nominal damages of $1 on the § 1983 Fourth Amendment claim and $1 on the battery claim. The jury did not award punitive damages.

Plaintiff now moves for a partial new trial, as to damages only, on the following grounds: (1) that the Court improperly admitted evidence regarding John's mental health and criminal history during the damages phase; (2) that the damages verdict is against the clear weight of evidence; and (3) that the Court gave an allegedly erroneous damage instruction on the § 1983 Fourth Amendment claim. The Court finds that none of these asserted grounds warrants a new trial.

1. Evidence of John's mental health and criminal history

During the damages phase, defendants put on evidence showing, *inter alia*, that John Watkins had schizophrenia and a history of substance abuse, and that he had a lengthy criminal history. The evidence also showed that plaintiff and her son had a troubled relationship, and that John had threatened or acted violently toward his mother and others in the past.

"A new trial is only warranted when an erroneous evidentiary ruling substantially prejudiced a party." *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1328 (9th Cir. 1995) (internal quotation and citation omitted). Here, evidence of John's mental health and criminal history was relevant to the nature and degree of emotional comfort and companionship that

plaintiff had received from her son.[1] *See Gates v. Rivera*, 993 F.2d 697, 700 (9th Cir. 1993) (stating in § 1983 wrongful death case brought by mother that "[r]estricted to the issue of damages, the questions as to [decedent son's] use of drugs were proper, and the district court had discretion to admit them as probative and not unduly prejudicial.").

2. Damages verdict

Plaintiff generally asserts that the damages verdict is not supported by the evidence, and that the nominal damages awarded constitute a miscarriage of justice. Plaintiff does not discuss any of the specific evidence adduced at trial, nor does plaintiff articulate how the damages award is contrary to the clear weight of the evidence.

The Court acknowledges the deep pain and loss that plaintiff has felt as a result of the death of her son. The Court is also sympathetic to plaintiff's argument that no individual's life is worth only one dollar. However, the Court cannot conclude that the damages award – which was for plaintiff's loss of John's care, comfort and companionship – is contrary to the clear weight of the evidence. Plaintiff was the only person to testify in support of her damages claim. Plaintiff testified, *inter alia*, that she and her

---

[1] Such evidence was also relevant to plaintiff's claim for damages for the loss of John's financial support; plaintiff abandoned that claim on the last day of trial.

son loved each other and had a close relationship. However, defendants painted a more complicated picture of the relationship; defendants' evidence showed that John had threatened plaintiff on several occasions, that plaintiff was afraid of him and periodically requested police assistance with him, that John had difficulty forming any meaningful relationships, and that John had a serious history of poorly-managed psychiatric instability. On this record, the Court cannot set aside the jury's damages verdict as against the weight of the evidence.[2]

3. 42 U.S.C. § 1983 nominal damages jury instruction

The jury was instructed that "[u]nder the Section 1983 claim, you must award nominal damages of no more than one dollar." As to the state law wrongful death claim, the jury was instructed that it could award compensatory damages for "loss of John Watkins' love, companionship, comfort, care, assistance, protection, affection, society, and moral support," as

---

[2] To the extent plaintiff contends that as a matter of law nominal damages can never be awarded in a wrongful death case, the Court disagrees. *See, e.g., Wilson v. City and County of San Francisco*, 106 Cal. App. 2d 440, 444 (1951) (stating that in wrongful death cases, "[c]ollateral heirs must prove their pecuniary loss or their recovery will be limited to nominal damages."); *see also Robison v. Leigh*, 153 Cal. App. 2d 730, 733-34 (1957) ("Four of the sisters had been completely out of touch with decedent for many years and we agree with appellant that their damages, if any, were purely nominal.")

well as punitive damages.[3] The jury awarded $1 on each claim.

Plaintiff contends that the Section 1983 damages instruction was erroneous, and that the jury should have been instructed that it could also award compensatory damages under Section 1983. The parties submitted competing instructions regarding the damages available under plaintiff's Section 1983 claim on behalf of the decedent for a violation of the decedent's Fourth Amendment rights. Plaintiff sought recovery for, *inter alia*, the loss of enjoyment of life and the pain and suffering experienced by her son prior to his death. The Ninth Circuit has not addressed the question of what damages are available under a Section 1983 wrongful death claim. After consideration of the parties' briefing, the Court concluded that the damages available under the Section 1983 excessive

---

[3] The "Compensatory State Law Wrongful Death Damages" instruction stated, *inter alia*, that plaintiff,

> "claims damages for the loss of John Watkins' love, companionship, comfort, care, assistance, protection, affection, society, and moral support No fixed standard exists for deciding the amount of such damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.
>
> In determining plaintiff Sylvia Mahach-Watkins' loss, do not consider:
>
> 1. The plaintiff's grief, sorrow, or mental anguish.
> 2. John Watkins' pain and suffering; or
> 3. The poverty or wealth of the plaintiff."

force/wrongful death claim are those set forth in California's survival statute, Cal. Code Civ. Proc. § 377.34. *See generally Venerable v. City of Sacramento*, 185 F.Supp.2d 1128, 1131-33 (E.D.Cal. 2002). California's survival statute does not allow recovery for the decedent's loss of enjoyment of life, or the decedent's pain and suffering, and thus the Court's Section 1983 instruction did not include those damages. The Court finds no error in the instruction that was given.

CONCLUSION

For the foregoing reasons, the Court DENIES plaintiff's motion for a partial new trial. (Docket No. 202).

IT IS SO ORDERED.

Dated: October 31, 2007 /s/ Susan Illston
SUSAN ILLSTON
United States
District Judge

APPENDIX F

08-15694

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff-Appellee,

v.

LARRY DEPEE, a California Highway Patrol Officer,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 3:05-cv-01143-SI
The Honorable Susan Illston, Judge

APPELLANT'S SUPPLEMENTAL EXCERPTS OF RECORD

VOLUME IV

* * *

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS, Plaintiff, **v.** **LARRY DEPEE, STATE OF CALIFORNIA, and DOES 1 through 100, Inclusive,** Defendants.	CASE NO. C-05-1143-SI **JOINT PRETRIAL CONFERENCE STATEMENT** Date: May 15, 2007 Time: 3:30 p.m. Court: Courtroom 10 Judge: Hon. Susan Illston TRIAL DATE: May 29, 2007

[2] This Joint Pretrial Conference Statement is filed pursuant to Federal Rule of Civil Procedure 16 and the Court's Pretrial Instructions:

(1) THE ACTION:

(A) Substance of the Action:

This is a civil rights and state wrongful death lawsuit arising from the shooting death of the plaintiff's son, John Watkins, by California Highway Patrol ("CHP") Officer Larry Depee on December 9, 2003. The plaintiff is Sylvia Mahach-Watkins, suing on her own behalf and on behalf of the Estate of John Watkins. The defendants are Larry Depee and his employer, the State of California.

The plaintiff's claims are as follows:

The First Amended Complaint: The operative complaint in this matter is the First Amended Complaint. However, pursuant to this Court's rulings on Defendants' Motion to Dismiss and Motion for Summary Judgment, the only causes of action which remain are Plaintiff's First Cause of Action (Wrongful Death based upon assault, battery and negligence), and her Sixth Cause of Action (Section 1983 Civil Rights Violations).

The defendants assert the following defenses:

Defendants claim that Officer Depee is entitled to qualified immunity on the plaintiff's § 1983 cause of action. Defendants maintain Officer Depee shot John Watkins in self-defense and that his use of deadly force was reasonable and justified under the circumstances. Defendants also maintain that plaintiff's state claims are barred by state law immunity principles, namely California Penal Code section 196 and Government Code section 820.2.

(B) <u>Relief Prayed</u>:

The plaintiff seeks the following damages and will present the following evidence concerning the amount of these damages:

i. *State Wrongful Death Claims.* Pursuant to *California Code of Civil Procedure* §377.61, Ms. Mahach-Watkins is entitled to damages which "under all circumstances of the case, may be just . . . " This

includes (1) the present value of future contributions from the decedent to Plaintiff, (2) the value of any personal service, advice or training that probably would have been [3] given; and (3) the value of the decedent's society and companionship. Plaintiff will testify at trial as to the value of contributions from Decedent as well as to the nature of her relationship with Decedent.

ii. *Pursuant to California Civil Code* §3294, Ms. Mahach-Watkins is entitled to punitive damages on all state claims.

iii. *Section 1983 Civil Rights Violations.* As to all of Plaintiff's civil rights claims, Plaintiff is entitled to (1) special damages including medical expenses and loss of income, (2) general damages, (3) punitive damages and (4) attorney fees and costs. As to special damages, Plaintiff will testify as to the nature and extent of these damages. Further, Plaintiff's retained expert, Dr. Kris Sperry, will testify as to the pain and suffering experienced by Decedent during the time that he was shot and the time that he died.

The defendants will present the following evidence concerning damages:

1. Expert testimony by John S. MacGregor, M.D., a cardiologist, to rebut plaintiff's claim that her heart attack was causally related to the shooting death of her son, John Watkins, and testimony about plaintiff's health problems.

2. Expert testimony by Bruce Victor, M.D., a psychiatrist, to rebut plaintiff's claims of emotional distress, and to establish John Watkins's level of functioning and his psychiatric prognosis had he lived.

3. Expert testimony by Richard T. Mason, M.D., a forensic pathologist, about John Watkins's life expectancy had he survived.

4. Documentary evidence such as medical, psychiatric, and criminal history records of decedent John Watkins to establish his level of functioning, earning potential, physical and mental health, and life expectancy, as well as medical and psychiatric records about plaintiff's own health and life expectancy.

(2) FACTUAL BASIS OF THE ACTION:

(A) Undisputed Facts:

Plaintiff Sylvia Mahach-Watkins was the natural mother of decedent John Watkins. John Watkins was shot by defendant CHP Officer Larry Depee on December 9, 2003 and died as

* * *

[10] 4. Pain and Suffering and Punitive Damages re Civil Rights Violations

The California survival statute, insofar as it excludes recovery for pain and suffering, is inconsistent with section 1983. *Guyton v. Phillips*, 532

F.Supp. 1154, 1166 (D.C.Cal, 1981). Its restrictions on recovery are significantly inhospitable to the policies fostered by the Act. *Id.* To deny recovery for pain and suffering would strike at the very heart of a section 1983 action. *Id.* Had the victim survived, he could have recovered, among other things, loss of earnings and pain and suffering. *Id.* The inescapable conclusion is that there may be substantial deterrent effect to conduct that results in the injury of an individual but virtually no deterrent to conduct that kills its victim. *Id.*

The remedy in a survival action, brought by the estate of the deceased victim, in accord with section 1983's express statement that the liability is "to the party injured." 42 U.S.C. § 1983. *Berry v. City of Muskogee, Okl.*, 900 P.2d 1489, 1507, C.A.10 (Okl.), 1990. It must make available to plaintiffs sufficient damages to serve the deterrent function central to the purpose of section 1983. *Id.* Appropriate compensatory damages include medical and burial expenses, pain and suffering before death, loss of earnings based upon the probable duration of the victim's life had not the injury occurred, the victim's loss of consortium, and other damages recognized in common law tort actions. *Id.* The state wrongful death actions are not foreclosed by this approach; they remain as pendent state claims. *Id.*

5. Lawful Resistance.

Penal Code § 692 provides that lawful resistance to the commission of a public offense may be made by the party about to be injured or by other parties.

Defendants' Contentions:

1. Under the U.S. Constitution, a peace officer may use deadly force if he reasonably believes, under all the circumstances known to the officer at the time, that such force is necessary to protect himself or others from death or serious physical harm. *Tennessee v.*

* * *

[45] **(D) Bifurcation, Separate Trial of Issues:**

Plaintiff desires that the issues of liability and damages be bifurcated and contends that it is feasible. Defendants will oppose bifurcation.

Dated: May 1, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the
State of California
TYLER B. PON
Supervising Deputy Attorney
General
S. MICHELE INAN
Deputy Attorney General

/s/
DAVID W. HAMILTON
Deputy Attorney General

Attorneys for Defendants
State of California and
Larry Depee

/s/
TORY M. PANKOPF
MARY HELEN BEATIFICATO

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor In Interest to the Estate of JOHN JOSPEH [sic] WAYNE WATKINS, Plaintiffs, v. LARRY DEPEE, STATE OF CALIFORNIA, and DOES 1 through 100, Inclusive, Defendants.	Case No. C-05-1143-SI [The Honorable Susan Illston] **PLAINTIFF'S PROPOSED SEPARATE JURY INSTRUCTIONS** **Pre-Trial Conference:** DATE: May 15, 2007 TIME: 3:30 P.M. ROOM: 10, 19th Floor

Pursuant to FRCP Rule 51, PLAINTIFF, SYLVIA MAHACH-WATKINS, respectfully submits her proposed separate jury instructions and requests the Court give the instructions to the jury:

* * *

[10] F.

MEASURES OF TYPES OF DAMAGES

In determining the measure of damages, you should consider:

The nature and extent of the injuries;

The loss of enjoyment of life experienced and which with reasonable probability will be experienced in the future;

The mental, physical, emotional pain and suffering experienced by John Watkins prior to his death;

The reasonable value of disability income lost to the present time;

The reasonable value of disability income which with reasonable probability will be lost in the future;

The reasonable value of necessary household help] [services other than medical] [and] [expenses] [_____] required to the present time;]

[The reasonable value of necessary [household help] [services other than medical] [and] [expenses] [_____] which with reasonable probability will be required in the future;]

[and]

GIVEN: _____
MODIFIED: _____
REFUSED: _____
WITHDRAWN: _____

Authority: Manual of Model Civil Jury Instructions for the Ninth Circuit; 2007 Edition Instruction No. 5.2

* * *

[39] DATED: May 5, 2007

BEATIFICATO & ASSOCIATES

BY: /S/ MARY H. BEATIFICATO
MARY H. BEATIFICATO,
Attorneys for Plaintiff,
SYLVIA MAHACH-WATKINS

DATED: May 5, 2007

LAW OFFICES OF TORY PANKOPF

BY: /S/ Tory M. Pankopf
TORY M. PANKOPF
Attorneys for Plaintiff,
SYLVIA MAHACH-WATKINS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor In Interest to the Estate of JOHN JOSPEH [sic] WAYNE WATKINS, Plaintiffs, v. LARRY DEPEE, STATE OF CALIFORNIA, and DOES 1 through 100, Inclusive, Defendants.	Case No. C-05-1143-SI [The Honorable Susan Illston] **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE IRRELEVANT AND PREJUDICIAL EVIDENCE OF DAMAGES** PreTrial Conference: DATE: May 15, 2007 TIME: 3:30 P.M. JUDGE: Hon. Susan Illston Trial Date: May 29, 2007

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Plaintiff, SYLVIA MAHACH WATKINS hereby submits the following opposition to Defendants' Motion in Limine to Exclude Irrelevant and Prejudicial Evidence of Damages (hereinafter "Motion").

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

This is a civil rights and wrongful death lawsuit arising from the shooting death of John Watkins by California Highway Patrol ("CHP") Officer Larry Depee on December 9, 2003. Defendant Larry Depee, used excessive and deadly force to make a safety stop to advise John Watkins to get a light for his bicycle and not to ride his bicycle southbound in the northbound lane of the "S" curves while cutting across to the southbound lane. After using his patrol car to stop John on his bicycle, Defendant Depee chased John into heavy brush and then shot and killed him while he was on the ground and some distance from Defendant Depee and his gun.

Plaintiff Sylvia Mahach-Watkins is the mother of John Watkins and brings this civil rights and wrongful death action on behalf of her deceased son and herself. The defendants are Larry Depee and the State of California.

* * *

[3] C. Pain and Suffering by Decedent Prior to Death (Section 1983 Claim)

Defendants contend that Plaintiff is not entitled to recover the pain and suffering experienced by John Watkins prior to his death. The Northern and Central Districts of California disagrees with the Defendants contention. *Guyton v. Phillips*, 532 F.Supp. 1154, 1166

(D.C.Cal, 1981); *Garcia v. Whitehead*, 961 F.Supp. 230, 233 (C.D. Cal. 1997).

The California survival statute, insofar as it excludes recovery for pain and suffering, is inconsistent with section 1983. *Guyton* @ 1166. Its restrictions on recovery are significantly inhospitable to the policies fostered by the Act. *Id.* To deny recovery for pain and suffering would strike at the very heart of a section 1983 action. *Id.* Had the victim survived, he could have recovered, among other things, loss of earnings and pain and suffering. *Id.* The inescapable conclusion is that there may be substantial deterrent effect to conduct that results in the injury of an individual but virtually no deterrent to conduct that kills its victim. *Id.*

The remedy in a survival action, brought by the estate of the deceased victim, in accord with section 1983's express statement that the liability is "to the party injured." 42 U.S.C. §1983. *Berry v. City of Muskogee, Okl.*, 900 F.2d 1489, 1507, C.A.10 (Okl.), 1990. It must make, available to plaintiffs sufficient damages to serve the deterrent function central to the purpose of section 1983. *Id.* Appropriate compensatory damages include medical and burial expenses, pain and suffering before death, loss of earnings based upon the probable duration of the victim's life had not the injury occurred, the victim's loss of consortium, and other damages recognized in common law tort actions. *Id.* The state wrongful death actions are not foreclosed by this approach; they remain as pendent state claims. *Id.*

Because California's survival statute excludes recovery for pain and suffering it is inconsistent with Section 1983. Thus, John's pain and suffering is recoverable under his Section 1983 claim.

II. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendants Motion except for evidence regarding Plaintiff's financial condition or needs.

DATED: May 8, 2007

BY: /S/ Tory M. Pankopf
TORY M. PANKOPF
MARY H. BEATIFICATO
Attorneys for Plaintiff,
Sylvia Mahach-Watkins

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SUSAN ILLSTON

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS, Plaintiffs, VS. LARRY DEPEE, STATE OF CALIFORNIA, and DOES 1 through 100, Inclusive, Defendants.	**Certified Copy** NO. C 05-01143-SI San Francisco, California Thursday August 9, 2007 8:30 a.m.

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

Reported By: **Lydia Zinn, CSR #9223, RPR**
Official Reporter –
U.S. District Court

* * *

[10] MS. BEATIFICATO: That was our brief.

MR. PANKOPF: That was from us.

THE COURT: I got a verdict form.

MR. HAMILTON: You get [sic] a verdict form? Maybe my secretary came in early. I don't know. She's very good.

MS. BEATIFICATO: The general damages aren't included on Claim 1. I read the Court's order.

THE COURT: Right. Well, and I think we'll have to – we'll have to revise this, because at this point, I don't see any distinction between Claim 1 and Claim 3, so I don't think we need to get them to separate that out, because the measure is the same.

MR. HAMILTON: Well, your Honor, I think – I think this is – the reason we put it in there is because we have a finding on the three claims. And the only civil rights claim on which there is a finding in plaintiff's favor is Claim 1. And if they had – already they have no compensatory damages. they have no damages at all. The only way –

THE COURT: Well, they – that's not true. Did you read the instructions that I sent out?

I ruled that the – I agree with the defendants that you can't get pain and suffering and predeath pain and suffering for Mr. Watkins. You can't get that.

However, I also ruled that the measure under that 1983 is the same as the measure under a wrongful death state [11] claim.

MR. HAMILTON: I thought that yesterday when we had this discussion after court, that the Court said – and we all agreed; there was no opposition, I thought – that the only damages available to them under line 1 was either punitive or –

THE COURT: Well, I have been thinking about that, but in reviewing what Judge Chesney said and what some of the other cases have said her conclusion was – and the other case's conclusion is – that if there's nothing except punitive damages, effectively, then it would not serve the deterrent purposes that 1983 is meant to serve. So it could be true to the survivorship statute in California – I mean, consistent with that, to allow the traditional wrongful death measure of damages in a 1983, but not the predeath pain and suffering, and that would not survive. And since in this case you have both claims, it seems to me a perfect situation for simply providing that one instruction.

MR. HAMILTON: Your Honor, this is a complete surprise to us.

THE COURT: I said it to you last night. I filed it.

MR. HAMILTON: Your Honor, I got – you filed it last night, and I think I got it at 5:00 o'clock, when I got back to my office.

That is a very important issue. Shouldn't we have a [12] chance to brief that issue? You cited one unpublished case. And the first time I got it was when you filed it last night. I think we should have a chance to brief that issue.

THE COURT: If it's wrong, it's wrong. It's also part of this case. You have two claims against the same folks for the same amount of damages. So it's going to make absolutely no difference.

MR. HAMILTON: As you know, civil rights cases – it will make a large difference. The proverbial tail wagging the dog is attorneys' fees.

THE COURT: I don't think this jury could say zero, if that's your question on 1983, because the nominal damage instruction says if you find no damages, then you should find nominal damages, which is 1 dollar. And there's still a tail on that.

MR. HAMILTON: According to basic Supreme Court authority within the last few years, if you get nothing but nominal damages, you're not entitled to attorneys' fees. We need to separate out the –

THE COURT: I see what you're saying, but I'm still going to give the same measure. And we'll have preserved for whatever you want the question of

whether that's the right way to measure it, but that's – I'm just going to give them the one standard.

MS. BEATIFICATO: Your Honor, my only concern is [13] this. If we separate them out – Claim 1 and Claim 3 – there needs to be something in the verdict form that expresses the jury's intent that – for example, let's say they award a dollar on – $2 on the Claim 1. And they also awarded $2 on Claim 3. They may intend for that to be in addition to what they awarded on Claim 1, rather than the same identical amount.

Does the Court follow?

THE COURT: The Court does not.

MS. BEATIFICATO: The jury could find that they want to award for Mr. Watkins' Fourth Amendment violation $2. And so they would write in, under Claim 1, $2. for those general damages.

And then they could also find separately that, as to Ms. Mahach's wrongful-death claim, that they want to award her $2. I say $2 again because it's just the identical amount, but it's their intent that they be in addition to each other.

For example, they intend that as – in the – that generally, they want to award $4; and then they split that $4 up between the two claims: $2 on one claim, and $2 on the other claim If there's a verdict form that makes that intent clear, then an issue may arise after the fact as to, well, what – was it the same amount that they intended to award, or was it the

addition of those two amounts together? And I think there needs to be something to make that clear.

THE COURT: Well, the measure is the same on both. [14] And it would not be – it was not intended to be – it would be incorrect to add them. So somehow, some way, we can make that – make that clear. I'm not at all sure that we need to have two – two lines.

MR. HAMILTON: Your Honor, I think we're making a huge mistake in doing this. Let me tell you why, without any additional briefing.

Wrongful death is a cause of action that belongs only to the – to Ms. Mahach for her own losses.

The damages in the Casey instruction that the Court has adopted, you know, go to care, comfort, and society. Those are her damages.

A survivor claim, which is the only thing that was at issue in the Fourth Amendment claim, is the decedent's loss, totally separate from the plaintiff's loss.

Then – so the only damages to be proved there, if pain and suffering is out, which the Court has ruled, would be did he suffer – did he have any medical injuries during the time that he survived?

Now, you know, he only lived 15 or 30 minutes. Theoretically, you could have a survivor case where someone would have substantial damages until they had died. Then they could live for years, for example.

So that's a very substantial item of damages in a survivor case.

We don't have that here, but that would be – that is [15] the decedent's damages, and only his damages.

So California law says that the survivor claim, which is what the Fourth Amendment is all about in Claim 1 in this case, is strictly John Watkins' damages. He has no provable damages here. And the Court said yesterday that, you know, it appeared that the only evidence to support any damages for him on Claim 1 is the nominal damages, because there's no proof of pain and suffering, and the law wouldn't allow that anyway. So then he can get nominal damages and punitive damages under the law and under the facts, and that's all. So that claim has got to be separated out. We can't combine Mrs. Watkins' totally separate claim for wrongful-death damages with Claim 1.

MS. BEATIFICATO: Your Honor, I'd like to add in: It makes absolutely no sense. I went home after the Court's discussion yesterday regarding jury instructions, and I was reading through the practice guides on civil rights and civil liberties litigation. And there is – besides that unpublished decision, there's a whole line of cases coming from other circuits. And essentially, it doesn't make sense from a policy stand point that the purpose behind the 1983 statute – that if somebody has their Fourth Amendment rights violated, but it goes so far as to kill them, that all of a sudden now, all of the things that would have been available to them are – had they lived, are no longer

available, so that you can only get something such as nominal damages. It just doesn't make sense. [16] And that's the policy that's reiterated throughout this line of cases, and that your Honor was – was alluding to in this unpublished decision.

MR. HAMILTON: Your Honor, to respond to that, we filed a motion on this, citing the cases that the Court discussed yesterday, many months ago. The Court had read them. Counsel had a chance to respond at that time.

We also raised the issue in the trial brief we filed – same issue. And Counsel never filed anything. And now she's telling us orally she's got cases from other circuits that we haven't even had identified; haven't seen.

The Court had already ruled yesterday that they had looked at the relevant cases cited by the defense, and agreed that the only damages – that pain and suffering is not available, and the only damages that would be available under the evidence would be nominal here, plus punitive. We all went away yesterday thinking that was the case.

Now Counsel, I guess, has a book in front of her, and she's going to tell you: Oh, there's other authority out there. Why didn't she tell the Court about this earlier?

MS. BEATIFICATO: I want to set the record straight. What Mr. Hamilton's referring to – they filed a motion *in limine* regarding the pain and

suffering. And there was an opposition by the Plaintiff. And we filed that opposition. So to say that we're raising this for the first time is just [17] incorrect.

The second thing is we're talking about apples and oranges. There are two different issues here. One is the issue of whether the decedent, or Mrs. Mahach on his behalf, is entitled to pain and suffering from the time that he was shot until the time that he died. That's one issue.

The second issue is what we discussed yesterday, and which the Court's ruling was going to last night – was: Can you get those wrongful-death damages in the 1983 action for the Fourth Amendment violation? That's a separate issue. And that has not been briefed before. So that is incorrect.

And specifically the cases that I was referring to, aside from the unpublished decision that your Honor cited to, is *Robertson versus Wegman*, and also the Frazier decision, which – I was looking for a cite to that, but I think it also supports that proposition as well, It just doesn't make sense for the purpose behind 1983 to say that if the police officer's conduct goes so far that the decedent or that that person dies as a result of their violations of the Fourth Amendment, that all of a sudden, all these damages are not available to them.

MR. HAMILTON: Your Honor, that is exactly what California law's survival statute says. I quoted it in my trial brief on page 26. Plaintiff's survival action may recover only damages, quote.

> Limited to the loss or damage that the [18] decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

That is the statute. That's California law. Talking – we are talking apples and oranges. Claim 1 is an apple. That is John –

THE COURT: Right. I think I disagree with you. I'll take another look at this. I think I disagree with you. So for your planning purposes today, my current plan is to go with the instructions that I provided. And we'll have to see how the verdict form pans out, in order not to be confusing. I will take a look at what you've said, but that's my current plan.

MR. HAMILTON: What verdict form are you planning on using?

THE COURT: What?

MR. HAMILTON: What verdict form –

THE COURT: Well, certainly yours will not work. I'll have to do another one. I'll get it for you, but whether it has two sections or one section is what I'm currently puzzling over; but the one that you'd suggested won't work, because it's inconsistent with what I plan to instruct them, [19] and it – because it's inconsistent with what I planned to instruct them.

MR. HAMILTON: Could I say one more thing?

THE COURT: Sure.

MR. HAMILTON: If you look at the jury instructions we submitted on liability, we broke up the three claims because the Court was convinced – and I think rightly so – that Claim 2 was – was based on Ms. Machach-Watkins' own claim under the Fourteenth Amendment. And that was separate from John Watkins' survivor claim under the Fourth Amendment, which was the subject of Claim 1.

We tried the case. We had the jury deliberate based on those instructions, breaking those claims out. And the final claim was entirely separate under state law for wrongful death.

Again, wrongful death is completely different from those other two claims. It is certainly different from Claim 1, which was only the decedent's Fourth Amendment claim; only his rights; only his interests. Those are totally different from her separate claim under California law, which was tried as Claim 3.

I don't know how we could possibly say that – that the jury should just now mix them all together and give Ms. Mahach-Watkins damages for her own wrongful death, which is care, comfort, society, support, and so on, and just, you know, [20] forget whether the decedent had any separate damages. Those are completely separate damages under the law. And the jury has got – seems to me, has got to

decide them separately here, you know, because the evidence shows there are no damages, unless possibly punitive damages and nominal damages for the decedent. His survivor claim is a completely separate issue from what her damages are.

MS. BEATIFICATO: Your Honor, one more comment I'd like to make for the record. Perhaps a suggestion is that we should separate them out.

I obviously agree with the Court, in that the plaintiff is entitled to – as a successor in interest, to get those compensatory damages for Mr. Watkins himself; but if we separated them out and then perhaps asked a question about whether the jury intended that those – that the damages under Claim 3 be in addition to the damages in Claim 1, for some reason, should there be a problem or the defendant wished to take the issue up on appeal, we don't have to have a retrial of the whole case, because the damages that the jury intended to award under Claim 1 are completely separate, and they can either be kept as is, or stricken.

THE COURT: All right. We'll see.

Now, there was one other thing on witnesses.

MS. BEATIFICATO: Yes.

THE COURT: Did you depose these witnesses?

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor In Interest to the Estate of JOHN JOSEPH WAYNE WATKINS, Plaintiffs, v. LARRY DEPEE, STATE OF CALIFORNIA, and DOES 1 through 100, Inclusive, Defendants.	Case No. C-05-1143-SI [The Honorable Susan Illston] **MOTION FOR PARTIAL NEW TRIAL ON DAMAGES** HEARING: , 2007 TIME: 8:30 A.M. ROOM: 10, 19th Floor (Filed Aug. 29, 2007)

TO DEFENDANTS STATE OF CALIFORNIA AND LARRY DEPEE, AND TO THEIR ATTORNEYS OF RECORD:

As soon as counsel may be heard by the above-entitled Court, located at 450 Golden Gate Avenue, 19th Floor, San Francisco, California, Plaintiff SYLVIA MAHACH-WATKINS will and hereby moves the Court for an order for a partial new trial on the damages and for an order excluding evidence regarding decedent's mental health history, history of drug use, and history of arrests convictions and other contacts with law enforcement (collectively, "Evidence"). This motion is brought on the following grounds:

* * *

[6] 2. The Purpose of California's Wrongful Death Statute is to Provide Compensation for Loss of Companionship.

The Purpose behind wrongful death statute is to provide compensation for loss of companionship. *Phraner v. Cote Mark, Inc.*, 63 Cal.Rptr.2d 740, 742 (1997). Recovery for loss of affection and society in a wrongful death action fulfills a deeply felt social belief that a tortfeasor who negligently kills someone should not escape liability completely, no matter how unproductive his victim. *Borer v. American Airlines, Inc.*, 563 P.2d 858, 866 (Cal.,1977). The loss of comfort, protection, and society of a deceased has an actual value which cannot be compensated by nominal damages. *Duclos v. Tashjian*, (1939) 90 P.2d 140, 145, 32 Cal.App.2d 444; *Gilmore v. Los Angeles Ry. Corp.*, (1939) 295 P. 41, 211 Cal. 192.

Here, the jury returned verdict of one dollar for the loss of comfort, protection and society of the decedent. This is contrary to California law. Loss of society cannot be compensated by nominal damages. The defendants cannot escape liability completely no matter how unproductive their victim was portrayed to be. The purpose of California's wrongful death statute is not fulfilled by this verdict of nominal damages. A miscarriage of justice has occurred.

Accordingly, the motion for a partial new trial should be granted.

3. The Jury Instruction for Nominal Damages on the 1983 Cause of Action was Erroneous.

Erroneous jury instructions, as well as the failure to give adequate instructions, are grounds for a new trial. *Murphy* @ [sic] 187. Here, the instruction to the jury that it could only award nominal damages on a Section 1983 wrongful death cause of action is inconsistent with Section 1983 policies of compensation and deterrence. "It defies history to conclude Congress purposely meant to assure the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil right statutes against the peril of death. *Brazier v. Cherry*, 293 F.3d 401, 404. Clearly, the plaintiff was entitled to an instruction of compensatory damages on her son's Section 1983 wrongful death claim. An instruction for only nominal damages sends a message to other law enforcement officers that if there is any doubt in their mind that they may have violated a citizen's civil rights they will be better off financially if they just finish their victim off.

[7] Accordingly, the motion for a partial new trial should be granted.

D. Conclusion.

Plaintiff has been substantially prejudiced by the admission of evidence regarding the decedent's mental health history, drug use and contacts with law enforcement. A miscarriage of justice has resulted

because no life is worth only one dollar. Lastly, the jury instruction for only nominal damages on the Section 1983 wrongful death action is erroneous and is inconsistent with its policies of compensation and deterrence.

Accordingly, the motion for a partial new trial should be granted.

DATED:
August 29, 2007

LAW OFFICES OF
TORY M. PANKOPF

BY: /S/
TORY M. PANKOPF,
Attorneys for Plaintiff

DATED:
August 29, 2007

BEATIFICATO &
ASSOCIATES

BY: /S/
MARY HELEN BEATIFICATO,
Attorneys for Plaintiff

APPENDIX G

NO. 08-15694

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYLVIA MAHACH-WATKINS, Individually and as the Successor In Interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff-Appellee,

v.

LARRY DEPEE and the STATE OF CALIFORNIA,

Defendants-Appellants.

On Petition to Appeal from a Judgment of the
United States District Court
Northern District of California
D.C. No. 3:05-cv-1143-SI
THE HON. SUSAN ILLSTON

SUPPLEMENTAL EXCERPTS OF RECORD

VOLUME I

* * *

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, individually, and as the successor in interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff,

v.

LARRY DEPEE and THE STATE OF CALIFORNIA,

Defendants. /

No. C 05-1143 SI

ADVICE TO COUNSEL RE: DAMAGE INSTRUCTIONS

(Filed Aug. 9, 2007)

The final damages instructions are attached. After further consideration of the matter, the Court concludes that the damages available under the Section 1983 excessive force/wrongful death claim are those set forth in California's survival statute, Cal. Code Civ. Proc. § 377.34. *See generally Venerable v. City of Sacramento*, 185 F. Supp. 2d 1128, 1131-33 (E.D. Cal. 2002). California's survival statute does not allow recovery for the decedent's loss of enjoyment of life, or the decedent's pain and suffering, and thus the Court's Section 1983 instruction does not include those damages. Under the facts of this case, the available Section 1983 damages consist of nominal and punitive damages.

Accordingly, the Court has modified the draft instructions to provide separate instructions on the Section 1983 claim and the state wrongful death

claim. The Court has also revised the instructions to clarify the availability of nominal damages under both claims.

IT IS SO ORDERED.

Dated: August 9, 2007

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge